

An Analysis of the 7th Circuit's Wisconsin Act 10 Anti-Public Sector Collective Bargaining Law Decision

Posted: 22 Jan 2013 02:54 PM PST

On Friday last week, the 7th Circuit in *Wisconsin Education Association Council vs. Walker* (7th Cir. Jan, 18, 2013), affirmed in part and reversed in part the Western District of Wisconsin's decision in the same case.

The case involves the now-infamous Wisconsin Act 10, which came to international prominence in February 2011 when Wisconsin Governor Scott Walker, under the pretense of a budget crisis, sought to attack public unions by passing legislation which would deny collective bargaining rights to most public sector employees in the state.

That only "most" public sector workers in Wisconsin were covered by Act 10 – most general public sector employees were, but most public safety workers were not – became the basis of the federal constitutional challenges under the First Amendment free speech clause and the equal protection clause in this case.

The Western District of Wisconsin held that Act 10's distinctions between different types of employees passed constitutional muster as far as the general anti-collective bargaining measure because it met the low-threshold rational basis review standard (there was a legitimate reason for such distinctions). On the other hand, the District Court struck down the anti-dues checkoff and punitive recertification provisions of the law as being without any legitimate basis.

The 7th Circuit in a 2-1 decision Friday upheld the law in its entirety. As an initial matter, the state was found to have a legitimate basis for denying some public employees collective bargaining rights but not public safety officers because of concerns about the public peace and order after the law passed. More interestingly, the Court said the First Amendment was not violated with regard to the anti-dues checkoff provisions because the state was seeking to subsidize some union speech, but not others. In such subsidy cases, the distinctions have to be reasonable and viewpoint neutral. The majority of the 7th Circuit held that it was reasonable because of concerns relating to labor peace and not viewpoint discriminatory because elections have consequences and politicians are permitted to favor one group of employees over another. The 7th Circuit also held that the anti-dues checkoff provisions and recertification provisions were not a pretext for viewpoint discrimination (this is where dissenting Judge Hamilton disagreed and would have found that the dues checkoff provision of Act 10 violated the First Amendment as a pretext for viewpoint discrimination).

With regard to the equal protection claims, the union dues and recertification provisions were found to meet the low standard of rational basis review because of the labor peace concerns the majority mentioned throughout the opinion.

Couple of thoughts on this long 74-page opinion:

1. It does not in any way put the Act 10 litigation to rest. This case merely decided one set of federal constitutional issues revolving around distinctions made between public safety officials and other public employees in Act 10. It does not have anything to do with Judge Colas decision made in Dane County Circuit Court in September, which is based on different reasoning all together and still at this point finds the law invalid (at least for municipal employees). Additionally, there is

other Act 10 litigation pending, including public pension litigation involving constitutional impairment of contract claims and state constitutional home rule charter claims.

2. Given that the whole *raison d'être* behind Act 10 when announced was to help trim the budget deficit, it is remarkable that the 7th Circuit barely discusses the State's assertion in this regard and relies primarily for the distinctions in the law based over concerns for labor peace. This may be in fact one of the concerns for collective bargaining distinctions, but to completely ignore the asserted budgetary reasoning, which had nothing to do with the dues checkout and recertification provisions, is outlandish.

3. It is also remarkable that two 7th Judges could say with a straight face that the law was not viewpoint discriminatory given that the union dues and recertification provisions were clearly a thinly veiled attempt to punish public unions that did not support Walker's 2010 election. I think the dissenting judge was right when he said this was really a limited public forum case (not just a subsidy case) and that at least the union dues provisions was clearly viewpoint discriminatory under the appropriate First Amendment analysis.

4. There could potentially be an en banc review or even a petition for cert to the Supreme Court, but I think this decision is largely the last word on these Act 10 issues.

5. I think it is also remarkable that the 7th Circuit ended up basing its decision largely on arguments that were not made before the district court and should have been considered waived on appeal under basic fundamentals of appellate review.

In all, not a very convincing decision from my standpoint and another blow for public unions in Wisconsin. In the end, litigation may lead to some changes in the law, but there really is no substitute for either seeking to amend the Wisconsin constitution to provide for public employee bargaining rights or getting the necessary Democratic majorities in the legislative chamber and a Democratic governor in Madison. Unfortunately, the confluence of those events may be a long way off and public unions are likely to suffer in the meantime.